

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANEXUS CHEMICALS CANADA L.P.,

Complainant,

v.

BNSF RAILWAY COMPANY,

Defendant.

Docket No. FD 35524

FILED
OCT 19 2011

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Part of
Public Record

**REPLY OF CANADIAN PACIFIC RAILWAY COMPANY TO
PETITION OF BNSF RAILWAY COMPANY TO VACATE THE EMERGENCY
SERVICE ORDER AND ESTABLISH AN EXPEDITED SCHEDULE TO ADDRESS
COMPLAINANT'S COMMON CARRIER CLAIMS**

Canadian Pacific Railway Company ("CP") submits this Reply to the Petition to Vacate the Emergency Service Order and Establish an Expedited Procedural Schedule filed by BNSF Railway Company on October 17, 2011 (the "BNSF Petition").

As CP stated in its October 5, 2011 letter (the "CP Letter"), CP takes no position with respect to the merits of the dispute among Canexus Chemicals Canada L.P. ("Canexus"), BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") regarding the appropriate U.S. interchange point for Canexus' chlorine shipments. Rather, CP intervened in this proceeding for the purpose of correcting certain inaccurate statements by BNSF and Canexus in their submissions to the Board, and to address the issue of the Board's authority to enforce the "common carrier obligation" set forth at 49 U.S.C. § 11101(a) extraterritorially.¹ CP likewise submits this Reply to respond to certain erroneous claims set forth in the BNSF Petition.

¹ The Board's Decision served on October 14, 2011 (the "*October 14 Decision*"), to which the BNSF Petition is addressed, granted CP's request to intervene as a party to this proceeding. See *October 14 Decision* at 5.

In its Petition, BNSF argues, *inter alia*, that there is no failure of traffic movement warranting issuance of an emergency service order due to the alleged “existence of the CP alternative” for Canexus’ shipments. BNSF Petition at 11. Specifically, BNSF asserts that:

“the Board was also wrong to conclude that an alternative routing on CP is not available because CP did not formally publish a tariff for that route. The governing statute in this country does not require publication of a tariff. . . . The fact that CP did not formalize its rate quote to Canexus in a contract or a published tariff is therefore irrelevant to the question whether the alternative CP service to Kansas City is available.”

Id. at 12. These assertions are both factually and legally incorrect.

As an initial matter, the informal quote set forth in CP’s September 14, 2011 email (attached to Canexus’ September 19, 2011 letter) has expired. Informal rate quotations provided by CP (and other carriers) do not remain in place indefinitely, particularly where the customer does not indicate any intention to tender traffic pursuant to the quotation. Canexus did not respond to CP’s September 14, 2011 email – indeed, Canexus has told the Board that it “never seriously considered” offering the subject traffic to CP, due both to the circuitry of CP’s route from North Vancouver to Kansas City and to the level of the rate suggested by CP. *See* Canexus September 19 Letter at 1-2. Canexus was recently notified that the informal quote provided by CP expired on October 13, 2011. CP has also advised Canexus that it “does not plan to re-quote on this route.” *See* Attachment 1. Accordingly, the exchange of emails between Canexus and CP does not constitute “new evidence that an alternative to BNSF or BNSF/UP service is available from CP.” BNSF Petition at 15.

Moreover, BNSF’s contention that the absence of a published CP tariff or executed contract for the subject movements is “irrelevant” to the question whether alternative service via CP is “available” to Canexus is incorrect. As the CP Letter explained, under Canadian law, a rate quotation does not become a lawful rate unless it is published in a tariff or set forth in a

confidential contract with the shipper. See CP Letter at 1-2. BNSF argues that, because formal tariff publication is not required under U.S. law, CP's informal quote was sufficient to make an alternate route "available" to Canexus as a matter of U.S. law. BNSF Petition at 12. This contention ignores the fact that, absent a published Canadian tariff, no route or rate exists pursuant to which CP could lawfully originate Canexus' shipments at North Vancouver. To the extent that BNSF takes the position that CP's informal quote created a viable routing alternative for the "U.S. segment" of a potential CP route (a moot point in light of the expiration of that informal quote), BNSF does not explain how the traffic could be delivered from North Vancouver to a border crossing point served by CP's U.S. lines.² The reality is that there is no "CP alternative" in place for the subject traffic.

Finally, BNSF argues that the Board's *October 14 Decision* "discriminates against BNSF," and that the "logical and rational choice" would have been for the Board to direct CP (rather than BNSF or UP) to handle Canexus' traffic pending resolution of this proceeding. BNSF Petition at 13, 14. Indeed, BNSF goes so far as to claim that "[it] is in the same situation as CP with respect to the transportation of Canexus' chlorine to Kansas City." BNSF Petition at 14. These assertions are nonsensical. To the extent that a "failure of traffic movement" with respect to Canexus' shipments is threatened, that threat is caused by BNSF's refusal to continue its prior practice of interchanging Canexus cars with UP at Kansas City.³ Both BNSF and UP

² BNSF does not operate any lines in Canada over which the traffic could move to an interchange with CP's U.S. network at Portal, ND or Noyes, MN. Moreover, even a cursory glance at a railroad map shows that a CN routing from North Vancouver to the Noyes gateway would involve a highly circuitous movement (involving hundreds of miles) on CN's lines north from Vancouver via Edmonton, Alberta; Saskatoon, Saskatchewan and Winnipeg, Manitoba to Noyes.

³ As the Board correctly observed in the *October 14 Decision* (at 2): "This dispute arises from BNSF's position that, in the future, it will carry the chlorine only as far as Spokane, Wash. (for movements originating from Marshall), and Portland, Or. (for movements originating from North Vancouver)."

clearly have the capability (although apparently not the commercial desire) to handle that traffic. Accordingly, the Board properly directed its emergency service order to the incumbent carriers, BNSF and UP. By contrast, CP has never handled the subject Canexus shipments, nor has Canexus ever requested that CP do so. To the contrary, Canexus stated unequivocally that it “never seriously considered” tendering that traffic to CP. Canexus September 19 Letter at 1-2. CP was a stranger to this proceeding until it became necessary for it to respond to erroneous claims by other parties regarding the existence of a lawful CP route and rate for the subject traffic.

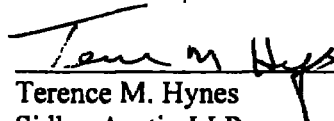
Based upon these undisputed facts, CP has no common carrier obligation with respect to the subject Canexus shipments, and there is no factual or legal predicate for the Board to issue an emergency service order requiring CP (rather than BNSF) to handle that traffic.⁴ BNSF’s claim that the Board should have directed CP to transport Canexus’ Kansas City shipments is a patently transparent attempt by BNSF to shift responsibility for TIH movements that BNSF would prefer not to handle itself.

⁴ In any event, for the reasons set forth in the CP Letter, the Board lacks jurisdiction pursuant to 49 U.S.C. § 11123 to require CP to provide rail service to Canexus in Canada.

CONCLUSION

For the foregoing reasons, CP respectfully requests that the Board reject BNSF's Petition, to the extent that it proposes that the Board's emergency service order be directed to CP, rather than BNSF.

Respectfully submitted,


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Dated: October 19, 2011

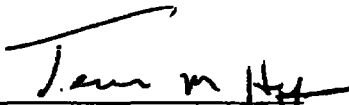
CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Reply of Canadian Pacific Railway Company to Petition of BNSF Railway Company to Vacate the Emergency Service Order and Establish An Expedited Schedule to Address Complainant's Common Carrier Claims to be served by first class mail, postage prepaid, this 19th day of October 2011 to:

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Terence M. Hynes

ATTACHMENT 1

From: Arthur Feygelson
Sent: Tuesday, October 18, 2011 1:35 PM
To: Cove, Marty (North Vancouver)
Cc: Elizabeth Hucker
Subject: RE: Chlorine rates for furtherance on the UP

Marty-

Further to CP's email dated September 14, 2011 (below), please be advised that this informal quote expired on October 13, 2011 (30 days as of the offer).

Please be advised that CP does not plan to re-quote on this route.

Arthur Feygelson
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Account Manager - Chemicals
CANADIAN PACIFIC
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C 917 453 7337
Customer Service 888 333 8111
Tariffs & Bulletins: <http://www.cpr.ca/en/customer-centre/tariffs/Pages/default.aspx>

From: Arthur Feygelson
Sent: Wednesday, September 14, 2011 4:53 PM
To: Cove, Marty (North Vancouver)
Subject: Chlorine rates for furtherance on the UP
Importance: High

Marty-

CPRS can offer the following rates for chlorine subject to standard CPRS Tariffs & Conditions (terms similar to our publication CPRS 4550 for handling to the Twin Cities MN):

North Vancouver BC to Chicago IL
\$24,189 US per car

North Vancouver BC to Kansas City MO
\$26,809 US per car

ATTACHMENT 1

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